APPENDIX

§ 43:21-7 Contributions.

Employers other than governmental entities, whose benefit financing provisions are set forth in section 4 of P.L. 1971, c. 346 (C. 43:21-7.3), and those nonprofit organizations liable for payment in lieu of contributions on the basis set forth in section 3 of P.L. 1971, c. 346 (C. 43:21-7.2), shall pay to the controller for the unemployment compensation fund, contributions as set forth in subsections (a), (b) and (c) hereof, and the provisions of subsections (d) and (e) shall be applicable to all employers, consistent with the provisions of the "unemployment compensation law" and the "Temporary Disability Benefits Law," P.L. 1948, c. 110 (C. 43:21-25 et seq.).

* * *

(c) Future rates based on benefit experience.

* * *

(5) (A) Unemployment Trust Fund Reserve Ratio. If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 4% but is less than 7% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall

be increased by 3/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3) or (4) of this subsection. If on March 31 of any calendar year the balance of the unemployment trust fund exceeds 2 1/2% but is less than 4% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall be increased by 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3) or (4) of this subsection.

If on March 31 of any calendar year the balance of the unemployment trust fund is less than 2 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer (1) eligible for a contribution rate calculation based upon benefit experience, shall be increased by (i) 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3), (4)(A) or (4)(B) of this subsection, and (ii) an additional amount equal to 20% of the total rate established herein, provided, however, that the final contribution rate for each employer shall be computed to the nearest multiple of 1/10% if not already a multiple thereof; (2) not eligible for a contribution rate

calculation based upon benefit experience, shall be increased by 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (4) of this subsection. For the period commencing July 1, 1984 and ending June 30, 1986, the contribution rate for each employer liable to pay contributions under R.S. 43:21-7 shall be increased by a factor of 10% computed to the nearest multiple of 1/10% if not already a multiple thereof.

(B) If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 10% but is less than 12 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall be reduced by 3/10 of 1% under the contribution rate otherwise established under the provisions of paragraphs (3) and (4) of this subsection; provided that in no event shall the contribution rate of any employer be reduced to less than 4/10 of 1%. If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 12 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate

calculation based upon benefit experience, shall be reduced by 6/10 of 1% if his account for all past periods reflects an excess of contributions paid over total benefits charged of 3% or more of his average annual payroll, otherwise by 3/10 of 1% under the contribution rate otherwise established under the provisions of paragraphs (3) and (4) of this subsection; provided that in no event shall the contribution rate of any employer be reduced to less than 4/10 of 1%.

(C) The "balance" in the unemployment trust fund, as the term is used in subparagraphs (A) and (B) above, shall not include moneys credited to the State's account under section 903 of the Social Security Act, as amended (42 U.S.C. § 1103), during any period in which such moneys are appropriated for the payment of expenses incurred in the administration of the "unemployment compensation law."

(D) Prior to July 1 of each calendar year the controller shall determine the Unemployment Trust Reserve Ratio, which shall be calculated by dividing the balance of the unemployment trust fund as of the prior March 31 by total taxable wages reported to the controller by all employers as of March 31 with respect to their employment during the last calendar year.

* * * *

Appendix

S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-19.

4. State law coverage of employees of nonprofit organizations and of state hospitals and institutions of higher education.

Present law.

Under existing federal law, services performed for non-profit religious, charitable, educational and humane organizations and for a state and its political subdivisions are exempt from the tax provisions of the federal unemployment tax act. There has not, therefore, been a tax-credit incentive for covering employees of these organizations and governments for unemployment compensation purposes. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations.

The committee does not want to change the present tax status of non-profit organizations, but is concerned about the need of their employees for protection against wage loss resulting from unemployment.

Appendix

House bill.

Under the house-passed bill, unemployment insurance protection for employees of nonprofit organizations, and state hospitals and state institutions of higher education would be achieved by making state law coverage of services excluded solely by reason of paragraphs (7) and (8) of section 3306(c) of the internal revenue code of 1954 a condition for providing all other employers in the state with the existing credit against the federal unemployment tax. The states would be required also to provide nonprofit organizations with the option of reimbursing the state for unemployment compensation payments attributable to service with the organization in lieu of paying contributions under the normal tax provisions of the state law. In effect, the nonprofit organizations would be allowed to adopt a form of self-insurance. Under the reimbursement method of financing, a nonprofit organization whose workers experience no compensated unemployment in a year would have no unemployment insurance costs for that year. The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.

Supreme Court, U.S.
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No. 04-1487

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,
Petitioner

v.

THE RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF THE UNITED HEALTHCARE SYSTEM, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, ARIZONA, CONNECTICUT, HAWAII, IDAHO, ILLINOIS, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OREGON, TENNESEE, VIRGINIA, WISCONSIN, WYOMING AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI

The Federal Unemployment Tax Act, 26 U.S.C. §3301 *et seq.*, establishes a cooperative state-federal program for the payment of unemployment compensation (UC) benefits;[1] and the *amici* States, like petitioner New Jersey, are responsible for administering that program within their respective States.[2] The Act

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[1] *See also* Subchapter III of the Social Security Act, 42 U.S.C. §§ 501 through 504.

[2] *See* Ala. Code §§ 25-4-30 to 25-4-152; Alaska Stat. §§ 5-535; Ariz. Rev. Stat. §§ 23-601 to 23-799; Ark. Code Ann. §§ 11-10-101 to 11-10-902; Cal. Unemp. Ins. Code §§ 1- 18012; Colo. Rev. Stat. § 8-70-101, et seq.; Conn. Gen. Stat. §§ 31-222 to 31-274j; Del. Code Ann. tit. 19 §§ 3301-3403; Florida Stat. Ch. 443.011-443.221; Ga. Code Ann. §§ 34-8-1 to 34-8-256; Haw. Rev. Stat. §383-61 to 383-79; Idaho Code §§ 72-1301 to 1385; Ill. Comp. Stat. §§ 405/100-405/3200; Ind. Code §§ 22-4-15-1 to 22-4-15-42; Iowa Code §§96 – 96.18; Kan. Stat. Ann. §§ 44.701-44.764; Ky. Rev. Stat. §§ 341.005-341.990; La. Rev. Stat. §§23-1471 to 1678; Me. Rev. Stat. 26, §§ 1041-1268; Maryland Code, Labor and Employment §§ 8-101-8-1608; Mass. Gen. Laws ch. 151A § 1-74; Mich. Comp. Laws §§ 421.1-421.75; Minn. Stat. §§ 268.001-268.26; Miss. Code Ann. §§71-5-1 to 71-5-541; Mo. Rev. Stat. §§ 288.010-288.500; Mont. Code Ann. §§ 39-51-101 to 39-51-3207; Neb. Rev. Stat. §§ 48-601 to 48-671; Nev. Rev. Stat. §§ 612.010 – 612.760; N.H. Rev. Stat. Ann. §§ 282-A:1-A1:80; N.M. Stat. Ann. §§ 51-1-1 to 51-1-59; N.Y. Lab. §§ 500-643; N.C. Gen. Stat. §§ 96-1 to 96-35; N.D. Cent. Code §§ 52-01-01 to 52-07.1-09; Ohio Rev. Code Ann. §§ 4141.01-4141.99; Okla. Stat. tit. 40 §§ 1-101 to 4-705; Oregon Rev. Stat. §§ 657-657.990; 43 P.S. §§751-914; R.I. Gen. Laws §§ 28-42-1 to 28-44-70; S.C. Code Ann. §§ 41-27-10 to 41-41-50; S.D. Codified Laws §§ 61-1 to 61-7-24; Tenn. Code Ann. §§ 50-7-101 to 50-7-714; Texas Labor Code Ann. §§ 201.001-215.004; Utah Code Ann. §§ 35A-4-101 to 35A-4-508; Vt. Stat. Ann. 21 §§ 1301-1461; Va. Code Ann. §§ 60.2-100 to 60.2-635; Wash. Rev. Code §§ 50.01.005-50.98.110; W.Va. (continued...)

provides that the UC program is to be funded by contributions assessed against most employers as a percentage of their quarterly payrolls, *see* 26 U.S.C. §§ 3301, 3302; but it also requires that non-profit employers like the respondent b e allowed instead to participate in the UC program by reimbursing the States for the benefits actually paid to their employees. *See* 26 U.S.C. § 3309(a).

Thus, the question faced by New Jersey in this case — whether these reimbursement obligations are "taxes" for purposes of the Bankruptcy Code's priority scheme — is one which is common to all of the States, and important to all of them. When a non-profit employer declares bankruptcy, large numbers of employees typically lose their jobs and receive UC benefits, giving rise to state claims for reimbursement. If these reimbursement claims do not receive priority in the employer's bankruptcy, the State is likely to receive little or nothing on the dollar; and the difference must be made up either by higher taxes on other employers, or by lower benefits for employees. The *amici* States have an interest in avoiding this unfair result, and in establishing uniform rules for the administration of the UC program.

SUMMARY OF ARGUMENT

1. This case presents an important question of federal bankruptcy law which affects all fifty States. Under the Federal Unemployment Tax Act (FUTA), the States are required to allow non-profit organizations to reimburse them for unemployment compensation benefits paid to their former employees. If these

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Code §§ 21A-1-1 to 21A-11-1; Wis. Stat. §§108.1-108.26; Wyo. Stat. Ann. §§ 27-3-101 to 27-3-705.

reimbursements constitute an excise tax under the reasoning of this Court in *State of New Jersey v. Anderson* and *City of New York v. Feiring*, then the States would be entitled to priority status under Sections 507(a)(1) and 507(a)(8) of the Bankruptcy Code. However, if as the Third Circuit held in this case, they do not, then the States will be relegated to the position of an unsecured creditor. As such, they will never recoup millions of dollars in unemployment compensation benefits paid from state funds. Such a result is contrary to Congress' intent in enacting both FUTA and the Bankruptcy Code.

2. The Circuits are divided on how to apply *Anderson* and *Feiring* to the priority provisions of the Bankruptcy Code. Because of the impact which the issue raised by this case has on the fiscal integrity of the States' unemployment compensation funds as well as other government programs, it needs to be resolved by the Court.

3. The reimbursement payments made by non-profits to the States are excise taxes under this Court's decisions in *Anderson* and *Feiring*. These payments are mandated by law and are used to support the States' unemployment compensation funds. The States have established these funds for the general welfare pursuant to their police powers. It is a fallacy to conclude, as did the Third Circuit, that these payments are "voluntary" or that they represent nothing more than a contract between non-profit organizations and the State for the right to conduct business.

ARGUMENT

I. Whether The States Have A Priority Claim For Payment Of The Unemployment Compensation Obligations Of Bankrupt Non-Profit Organizations Is An Important Issue Which The Court Should Resolve.

Non-profit employers play a significant role in the unemployment compensation (UC) program. All fifty States, as a condition of federal certification and funding under the Federal Unemployment Tax Act (FUTA), allow non-profits to participate in the UC program by reimbursing the States for UC benefits paid to the non-profits' employees. In 2003, non-profit organizations employed an average of 7.4 million people[3]; in the same year, the States paid former employees of non-profits almost a billion dollars in UC benefits.[4] Although not all of these benefits were paid as a result of bankruptcy, employees of non-profit organizations which are in financial difficulty and are forced to declare bankruptcy are of course more likely to lose their jobs than are those who work for more financially stable employers.

When a large non-profit employer — a hospital, say — declares bankruptcy, UC payments can easily approach or even exceed a million dollars. In Pennsylvania, the bankruptcy of Sacred Heart Hospital of Norristown resulted in UC payments — and a state reimbursement claim — of $3 million; and the bankruptcy of Allegheny Health Education and Research Foundation resulted in a reimbursement

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[3] Unemployment Insurance Financial Data Handbook 394 (U.S. Dep't of Labor, Employment and Training Administration (DOLETA)).

[4] The exact figure is $992 million. *Ibid.*